IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 384 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HASUMATIBEN DEVENDRABHAI MAKWANA

Versus

ASHWINBHAI MANIBHAI PATEL

Appearance:

MR ANANDJIWALA for Petitioner

MR SK BUKHARI for Respondent No. 1

MR KC SHAH, APP for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 05/10/2000

ORAL JUDGEMENT

1. This revision is directed against the order dated May 12, 1998 of the Special Judge, Ahmedabad, under which he has rejected the application of the revisionist, praying that the case be remitted to the Chief Judicial

Magistrate for issuing notice to the complainant, informing that charge-sheet has not been submitted against the respondent no.1 herein, and to direct the Police to tender necessary report under sec.169 of the Code of Criminal Procedure.

2. The brief facts are that, FIR was lodged by the revisionist inter alia against the respondent no.1 Ashwinbhai Manibhai Patel and three others. The Police conducted investigation and, ultimately submitted charge-sheet against three persons but, did not submit charge-sheet against the respondent no.1 Ashwinbhai Patel. The revisionist had no intimation, either from the Chief Judicial Magistrate or from the Special Judge as to why the Police did not submit charge-sheet against the respondent no.1. Consequently, application was moved by the revisionist with the above prayers. The said application was rejected by the Special Judge observing that, "the application is dismissed at this stage with reserving the right of the complainant to apply at proper stage to join the alleged persons as an accused, if any primary evidence will be found out during trial."

3. Shri Anandjiwala, learned counsel for the revisionist, Shri SK Bukhari, learned counsel for the respondent no.1 and Shri KC Shah, learned APP have been heard.

4. The contention of Shri Anandjiwala has been that, if FIR is lodged against several accused and the Police, after investigation did not choose to submit charge-sheet against one of such persons named in the FIR then, a report under sec.169 of the Code of Criminal Procedure should have been submitted by the Police in favour of such person. And, on receipt of such report, the learned Magistrate should have issued notice to the complainant and the complainant should have been heard before the matter could have proceeded any further.

5. The contention of the learned counsel for the revisionist is no doubt in accordance with the law but, it should not be forgotten that the learned Magistrate was only committing the case to the Court of Sessions because, the case was exclusively triable by the Special Judge, in as much as, one of the offence was committed under the Atrocities Act. If, such was the case then, the Magistrate was to act under sec.209 of the Code of Criminal Procedure and, his only obligation under the amended code is to furnish copies of documents relied upon by the prosecution to the accused. And, if the Magistrate found that the case was exclusively triable by

the Court of Sessions, it had no option but, to commit the same to the Court of Sessions. The Magistrate had no jurisdiction to sift the evidence or to weigh the evidence. As such, the Magistrate, in case exclusively triable by the Court of Sessions, could not have issued notice to the complainant nor, could have forced the Investigating Agency to submit a report under sec.169 of the Code of Criminal Procedure.

6. The Apex Court in Raj Kishore Prasad v. State of Bihar 1996(4) SCC p.495 has laid down the law on the subject as follows :-

> "16. Thus we come to hold that the power under Section 209 CrPC to summon a new offender was not vested with a Magistrate on the plain reading of its text as well as proceedings before him not being an `inquiry' and material before him not being `evidence'. When such power was not so vested, his refusal to exercise it cannot be corrected by a Court of Revision, which may be the Court of Session itself awaiting the case on commitment, merely on the specious ground that the Court of Sessions can, in any event, summon the accused to stand trial, along with the accused meant to be committed for trial before it. Presently it is plain that the stage for employment of Section 319 CrPC has not arrived. The order of the Court of Sessions requiring the Magistrate to arrest and logically commit the appellant along with the accused proposed to be committed to stand trial before it, is patently illegal and beyond jurisdiction. Since the Magistrate has no such power to add a person as accused under Section 319 CrPC when handling a matter under Section 209 CrPC, the Court of Sessions, in purported exercise of revisional powers cannot obligate it to do so. The question posed at the outset is answered accordingly in this light. When the case comes after commitment to the Court of Sessions and evidence is recorded, it may then in exercise of its powers under sec.319 CrPC on the basis of the evidence recorded by it, if circumstances warranting, proceed against the appellant, summon him for the purpose, to stand trial along with the accused committed, providing him the necessary safeguards envisaged under sub-section (4) of sec.319. Such course is all the more necessary in the instant case when expressions on merit have extensively been made in the orders of the Magistrate, the

> Court of Sessions and that of the High Court. Any other course would cause serious prejudice to the appellant."

7. In short, it is clear from the above observation of the Apex Court that, if evidence is brought before the Sessions Judge that some accused has committed offence but, he is not named in the charge-sheet submitted by the Police, the Sessions Judge can exercise powers under sec.319 of the Code of Criminal Procedure. The same power seems to have been indicated in the impugned order when the Special Judge has mentioned that right of the complainant to apply at proper stage to join respondent no.1 as an accused has been reserved, provided any primary evidence is found against him during trial.

8. In face of such reservation of right in favour of the revisionist, I think not only guidelines of the Apex Court in Raj Kishore Prasad v. State of Bihar (Supra) have been impliedly followed but, substantial justice has been done. No prejudice is likely to be caused to the revisionist from the impugned order. As such, there is no reason to disturb the impugned order. The revision is therefore dismissed.

October 5, 2000. (D.C. Srivastava, J.)

/sakkaf